UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968
NO. 1153

PAUL CIAFFONI, CONCETTA CIAFFONI and
PETER CIAFFONI, Petitioners
v.
BRUNSWICK CORPORATION and
BRUNSWICK AUTOMATIC PINSETTER
CORPORATION, Respondents

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania (Western District)

BRIEF IN OPPOSITION

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OPINIONS BELOW

The Petition was in error in stating that the opinions of the Supreme Court of Pennsylvania were not yet officially or unofficially reported. Those opinions were published *sub nom.* Brunswick Corporation v. Ciaffoni at 432 Pa. 442 in the official Pennsylvania Advance Reports, Vol. 77, No. 3, dated January 17, 1969, and at 248 A.2d 39 in pamphlet dated January 4, 1969. Moreover, petitioners have incorrectly headed the opinion by Mr. Justice O'Brien in their Appendix (p. 18) as the "Opinion of the Court". The official Pennsylvania Advance Reports (p. 444) list the opinion as "Opinion By Mr. Justice O'Brien". Petitioners' Appendix also is inaccurate, and inconsistent with the official Reports, in

representing that Mr. Justice Musmanno (who died a month before the decisions were handed down) joined in the dissent. It further fails to reflect the official Reports' notation that neither Chief Justice Bell nor Mr. Justice Musmanno participated in the decision. The official Reports show the alignment of opinions and Justices as follows:

"Opinion By Mr. Justice O'Brien"—Justices O'Brien and Cohen;

"Concurring Opinion By Mr. Justice Eagen"—Justices Eagen and Jones;

"Dissenting Opinion By Mr. Justice Roberts"—Justice Roberts.

JURISDICTION

Respondents assert that this Court has no jurisdiction, within Article III, Section 2 of the Constitution of the United States, and under 28 U.S.C. §1257(3), to direct a writ of certiorari to the Supreme Court of Pennsylvania in this case.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Involved in the disposition of the Petition for Certiorari are:

(a) Article III, Section 2, clause 1 of the Constitution of the United States, which provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

(b) Section 1257(3) of the Judicial Code, Act of June 25, 1948, c. 646, 62 Stat. 869, as amended, 28 U.S.C. §1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being re-

pugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTION PRESENTED

Do Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1257(3) allow the Supreme Court to exercise jurisdiction on certiorari to a State court on the sole ground that two of the five participating members of the State court said that a final order in a federal bankruptcy proceeding was determinative of the case?

STATEMENT

The statement of the case in the Petition sets forth only some of the facts relevant to the federal issue presented by respondents in the courts below. It does not recite the facts relevant to the non-federal issues upon which the case was decided by all but two of the judges of the two courts below. Respondents do not believe it necessary to supply these omissions. All that is required for the present disposition is a correction of the statements in the last paragraph of page 4 of the Petition. The Supreme Court of Pennsylvania did not decide the case as there represented. The decision in respondents' favor was based on the opinion of two justices who addressed themselves to the federal issue and the opinion of two who rejected respondents' position on the federal issue but adopted one of respondents' purely State law grounds for decision. The fifth member of the Pennsylvania Supreme Court dissented on all grounds.

ARGUMENT

Two members of the Pennsylvania Supreme Court were of the opinion (Appendix to Petition, pp. 21-22) that the issue of the right of respondents to possession of the disputed bowling equipment had already been finally litigated in the bankruptcy action in the federal court. They found it unnecessary to consider respondents' various non-federal grounds. They did, however, say that property remains in *custodia legis* at least until an order of a referee in bankruptcy covering such property could be "effected" (*ibid.*, p. 21), thereby implying, as a matter of Pennsylvania law, that the *custodia legis* limitation on the right of distraint prevented petitioners from prevailing in any event.

The two other members of the Pennsylvania Supreme Court who found in respondents' favor (*ibid.*, p. 23) rejected all bankruptcy law arguments and said that respondents, as third-party donee beneficiaries under Pennsylvania law, were entitled to enforce petitioners' contractual waiver of their distraint rights. The sole dissenting member of the Pennsylvania Supreme Court (*ibid.*, p. 24) also rejected all arguments based on the federal bankruptcy laws and argued instead that the concept of *custodia legis* as it had existed under prior Pennsylvania state decisions should not be changed.

The Supreme Court of the United States has no jurisdiction under Article III, Section 2 of the Constitution to exercise jurisdiction in this case. The case is not one arising under the Constitution or laws of the United States. The Petition merely attacks the opinion of two (out of five) members of a State court who would limit

rights under the State's distraint laws against property awarded by a federal bankruptcy reclamation order.

This Court has no jurisdiction under 28 U.S.C. §1257(3) to direct a writ of certiorari to the Supreme Court of Pennsylvania. The validity of no treaty or statute of the United States, nor of any State statute, was drawn in question in the courts below. Respondents' only claim of title, right, privilege or immunity under the Constitution and laws of the United States was expressly rejected by all but two out of the five participating members of the Pennsylvania Supreme Court.

The Petition does not assert the existence of any conflict of decisions. It attempts to ignore the fact that whatever federal question there was in the case disappeared when only two Pennsylvania justices agreed with respondents' bankruptcy law contentions and three expressly rejected them. The Pennsylvania Supreme Court has not "decided" any "federal question of substance": *cf.* Revised Rule 19.1(a).

Though we submit that Mr. Justice O'Brien and Mr. Justice Cohen were correct in their views, there is in any event no occasion for this Court to review their minority position on a question which is not substantial. Neither do the Constitution and laws of the United States permit this Court to exercise jurisdiction in this case.

CONCLUSION

The Petition should be dismissed.

Respectfully submitted,
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